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90-695

Supreme Court, U.S.
FILED
AUG 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

R. STUART HUFF, As Trustee,

Petitioner,

v.

STANDARD LIFE INSURANCE COMPANY,
a Mississippi Corporation

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS, VIOLATED THE DUE PROCESS RIGHTS OF THE PETITIONER AS GUARANTEED TO THE PETITIONER BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT FAILED TO FOLLOW THE DICTATES OF THE "ERIE THOMPKINS" DOCTRINE AND RENDERED ITS DECISION, BELOW, BASED ON ITS DETERMINATION TO USE THE LAW OF COLORADO AS THE PRECEDENT TO BE FOLLOWED IN THE CASE SUB JUDICE INSTEAD OF ATTEMPTING TO CONSTRUE THE LAW OF FLORIDA, WHICH WAS AVAILABLE TO IT WHEN SITTING IN A DIVERSITY CASE, CONCERNING THE PROOF NECESSARY TO ESTABLISH A RIGHT TO RECEIVE LIFE INSURANCE BENEFITS IN TIMELY REJECTING THE POTENTIAL INSURED AS A RISK.

2. WHETHER, THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL APPELLATE COURTS ON THE ISSUE OF THE PROCEDURES TO BE USED BY THE FEDERAL APPELLATE COURTS WHEN SITTING IN A DIVERSITY CASE REGARDING THE LAW THAT THE APPELLATE COURT MUST APPLY WHEN SITTING IN A DIVERSITY CASE AND, IF SO, WHETHER THE 11TH CIRCUIT ERRED WHEN IT FAILED TO CERTIFY THE INSTANT CASE TO THE SUPREME COURT OF FLORIDA FOR A CONSTRUCTION OF FLORIDA LAW OR IN FAILING TO TRY TO CONSTRUE THE LOWER FLORIDA APPELLATE COURT DECISIONS CONCERNING THE PROOF THAT WOULD BE NECESSARY IN A NEGLIGENT NOTICE OF REJECTION IN A CASE WHERE AN INSURANCE COMPANY FAILED TO TIMELY NOTIFY ITS INSURED OF ITS REJECTION OF INSURANCE COVERAGE UNTIL AFTER THE INSURED HAD DIED.

3. WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE INTERVENTION OF THIS HONORABLE COURT WHEN IT DETERMINED THAT THE JURY VERDICT FINDING THE RESPONDENT INSURANCE COMPANY WOULD

OWE THE PETITIONER'S DECEDENT INSURANCE COVERAGE BY VIRTUE OF ITS HAVING FAILED TO TIMELY NOTIFY OF A REJECTION BY CONSTRUING THE LAW OF COLORADO AS BEING THE APPLICABLE LAW TO BE FOLLOWED WHEN THE CASE AROSE UNDER AND PURSUANT TO FLORIDA LAW AND SHOULD HAVE BEEN DETERMINED IN ACCORDANCE WITH FLORIDA LAW, WHICH LAW WOULD NOT REQUIRE THE PROOF OF INSURABILITY.

TABLE OF AUTHORITIES

	PAGES
QUESTIONS PRESENTED	i
OPINIONS BELOW.....	2
JURISDICTION.....	3
STATEMENT OF CASE.....	4
REASONS FOR GRANTING WRIT.....	8,12,15

POINT I. THE COURT OF APPEALS, SITTING A DIVERSITY CASE, VIOLATED THE DUE PROCESS RIGHTS OF THE PETITIONER AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT FAILED TO FOLLOW THE DICTATES OF THE "ERIE THOMPKINS" DOCTRINE AND USED THE LAW OF COLORADO AS THE PRECEDENT TO BE FOLLOWED IN THE CASE SUB JUDICE INSTEAD OF APPLYING THE LAW OF FLORIDA.

POINT II. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL APPELLATE COURTS ON THE ISSUE OF THE PROCEDURES TO BE USED BY THE FEDERAL APPELLATE COURTS WHEN SITTING IN A DIVERSITY CASE REGARDING THE LAW THAT THE APPELLATE COURT MUST APPLY AND, IF SO, WHETHER THE ELEVENTH CIRCUIT ERRED WHEN IT FAILED TO CERTIFY THAT INSTANT CASE TO THE SUPREME COURT OF FLORIDA FOR A CONSTRUCTION OF FLORIDA LAW OR IN FAILING TO TRY TO CONSTRUE THE LOWER FLORIDA APPELLATE COURT DECISIONS CONCERNING THE PROOF THAT WOULD BE NECESSARY.

POINT III. THE ELEVENTH CIRCUIT COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE INTERVENTION OF THIS HONORABLE COURT WHEN IT DETERMINED THAT THE JURY VERDICT FINDING THE RESPONDENT INSURANCE COMPANY WOULD OWE THE PETITIONER'S DECEDENT INSURANCE COVERAGE BY VIRTUE OF ITS HAVING FAILED TO TIMELY NOTIFY OF A REJECTION BY CONSTRUING THE LAW OF COLORADO AS BEING THE APPLICABLE LAW TO BE FOLLOWED WHEN THE CASE AROSE UNDER AND PURSUANT TO FLORIDA LAW AND SHOULD HAVE BEEN DETERMINED IN ACCORDANCE WITH FLORIDA LAW, WHICH LAW WOULD NOT REQUIRE THE PROOF OF INSURABILITY.

CONCLUSION..... 17

CERTIFICATE OF MAILING..... 18

APPENDIX 20

TABLE OF AUTHORITIES

PAGES

Benante v. Allstate, Ins. Co., 477 F.2d 553 (5th Cir. 1973)... 10

Burns Mtg. Co. v. Fried, 292 U.S. 487 (1933)..... 16

Erie Co. v. Thompkins, 304 U.S. 64 (1937)..... 10

Heller, Mark & Co. v. Kassler & Co.,& 54 P.2d 995 (Ct. App. Colorado 1976) 7

Huberman v. John Hancock Life Ins. Co., 492 So.2d 416 (Fla. DCA 1986)..... 5

Independent Life Insurance v. McKenzie, 503 So.2d 376 (Fla. 1st DCA 1987).. 17

Life & Casualty Ins. Co. of Tenn. v. Central Steel Products, 709 S.W. 2d 830 (Ky App. 1986)..... 7

Machinery Center Inc. v. Anchor National Life Ins. Co., 434 F.2d 1 (10th Cir. 1970)..... 13

Matthews v. Metropolitan Life Insurance Co., 89 So.2d 64 (Fla. 1956) 11

Nobbs Chemical, U.S.A., Inc. v. Kippers Co., 616 F.2d 212 (5th Cir. 1980)..... 10

Rayonier, Inc. v. Bryan, 249 F.2d 405 (5th Cir. 1957)..... 15

Reynolds v. American Life Ins. Co., 591 F.2d 343 (5th Cir. 1979)..... 10

State v. Smith, 118 So.2d 792 (1st DCA Fla. 1960)..... 11

TABLE OF AUTHORITIES

	PAGES
United States v. Salerno, 481 U.S. 739 (1987).....	9
Weaver v. West Coast Life Ins. Co., 42 P.2d 729 (Mont. 1935).....	7
Wolf v. McDonnell, 418 U.S. 539 (1974)	9
OTHER AUTHORITIES:	
28 U.S.C. Section 1652	3
Amendment V, the United States Constitution: "No person shall be . . . deprived of life, liberty or property, without due process of law; . . .	3
Title 28 U.S.C. 1652: The laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.	3

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

R. STUART HUFF, As Trustee,

Petitioner,

v.

STANDARD LIFE INSURANCE COMPANY,
a Mississippi Corporation

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

R. Stuart Huff, Trustee, the petitioner herein prays that a writ of certiorari issue to review the judgment of the 11th Circuit Court of Appeals entered on the 2nd day of April, 1990, with the rehearing having been denied on the 4th day of June, 1990.

OPINIONS BELOW

The Opinion of the Eleventh Circuit Court of Appeals reported at _____ F.2d _____ (1990) and is printed in Appendix A hereto, infra, page App. 1-13, was rendered on the 2nd day of April, 1990. The Motion for rehearing was denied on the 4th day of June, 1990 and is printed in Appendix A, infra, at page A-14-15.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals sought to be reviewed was made and entered on April 2, 1990. An order denying a timely motion for rehearing was denied on June 4, 1990. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question is 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V, the United States Constitution: "No person shall be * * * deprived of life liberty, or property, without due process of law; * * * "

Title 28 U.S.C § 1652: The laws of the several states * * * shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

R. Stuart Huff, filed a complaint against Standard Life Insurance Company, ("Standard Life") in the United States District Court for the Southern District of Florida, claiming payment due on an insurance policy which insured the life of Alejandro J. Torres-Ciliberto, who died from a gunshot wound on August 14, 1978. Mr. Torres had applied to Standard Life for a million dollar policy on May 31, 1978. Thereafter, Mr. Torres complied with the necessary requirements of Standard Life to secure the insurance including an interview with a company hired by the insurance company to verify financial and personal information to determine if Alex Torres was an insurable risk and medical examinations, to determine the same. On August 14, 1978, Alex Torres was shot and killed.

Standard Life refused to pay the claim submitted to it for the death of Alex Torres.

Thereafter, on April 24, 1979, the Petitioner, Stuart Huff, as trustee for the beneficiary of the policy, filed his lawsuit. On April 6, 1987, a jury returned a verdict, pursuant to Florida Law, making a determination that the insurance company, Standard Life, had been negligent in not timely rejecting Mr. Torres that his application for insurance had been rejected, which is a cause action recognized under the Florida law. Huberman vs. John Hancock Life Insurance Co., 492 So.2d 416 (Fla. 4th DCA 1986). In accordance with the verdict the United States District Court entered a judgment in favor of Mr. Huff for $750,000.00 plus interest at the rate of 6.04%. (App. 16). Standard then filed its post trial motions, which were considered by the Court and denied.

Thereafter the insurer, Standard Life, took an appeal to the Circuit Court of Appeals, Eleventh Circuit, claiming that the judgment should not have been allowed. Mr. Huff filed

a cross appeal claiming among other things that the amount of the judgment was insufficient in that the court had failed to award the prejudgment interest he was entitled to as well as statutory attorney's fees.

On April 2, 1990, the Eleventh Circuit Court of Appeals rendered its opinion in the case and reversed the Judgment of the United States District Court on the basis of Colorado law instead of basing its decision on Florida law. (App. 1-13). Although in its opinion the Court recognized that there was Florida law on the subject the Court chose to distinguish one of the Florida cases and ignored another and then relied upon Colorado law as the controlling law. The Eleventh Circuit, following Colorado law, held that in order for Mr. Huff to recover, on a negligence theory of failing to notify Mr. Torres of his rejection in a timely manner, Mr. Huff would have to prove that Mr. Torres was an insurable risk to some company other than Standard Life.

Florida law holds that an insurance company has an affirmative duty to notify an applicant within a reasonable period of time of its decision to reject an application for a life insurance policy. Huberman, supra. If the insurer fails to timely notify the applicant of its decision not to insure them, Florida law provides that the insurer must suffer the consequence of its negligence by deeming the policy to have been issued. Huberman, supra. Florida law, unlike Colorado law, does not require the applicant to prove that he was insurable to a company, other than the negligent insurer in order to recover damages. The Eleventh Circuit, however, relied upon cases decided in states that did not recognize this cause of action. Life & Casualty Ins. Co. of Tenn. v. Central Steel Products, 709 S.W. 2d 830 (Ky App. 1986); Weaver vs. West Coast Life Ins. Co., 42 P. 2d 729 (Mont. 1935); and Heller, Mark & Co. vs. Kassler & Co., 54 P.2d 995 (Ct. App. Colorado

1976). In reversing the decision below the Court then rendered moot the issues raised on the cross appeal wherein Mr. Huff was seeking prejudgment interest and statutory attorney's fees, and a finding that comparative negligence on behalf of the decedent insured was not an appropriate finding by the jury. Thereafter a timely motion for rehearing was filed. On June 4, 1990, the Eleventh Circuit Court of Appeals denied this rehearing. By virtue thereof it adopted a new test to be applied by the Federal Courts when sitting in the diversity case.

REASONS FOR GRANTING CERTIORARI

POINT I. THE COURT OF APPEALS, SITTING A DIVERSITY CASE, VIOLATED THE DUE PROCESS RIGHTS OF THE PETITIONER AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT FAILED TO FOLLOW THE DICTATES OF THE "ERIE THOMPKINS" DOCTRINE AND USED THE LAW OF COLORADO AS THE PRECEDENT TO BE FOLLOWED IN THE CASE SUB JUDICE INSTEAD OF APPLYING THE LAW OF FLORIDA.

The due process clause of the Fifth Amendment to the United States Constitution protects individuals against two types of governmental action: (1) "substantive due process" which prevents the government from engaging in conduct that shocks the conscience, or which interferes with the rights implicit in the concept of ordered liberty; and (2) "procedural due process" which requires governmental action which deprives a person of life, liberty or property to be implemented in a fair manner. United States v. Salerno, 481 U.S. 739 (1987). The touchstone of due process is of course the protection of the individual against arbitrary action of government. Wolff v. McDonnell, 418 U.S. 539 (1974).

It is respectfully submitted that the Eleventh Circuit Court of Appeals has violated these dictates and has shocked the conscience by totally departing from the essential requirements of law when it applied its own

standard of review to the case sub judice and decided its outcome based on Colorado law instead of Florida law. This application of the Colorado law constituted a departure from the dictates laid down by this Court in Erie Co. v. Thompkins, 304 U.S. 64 (1937) and followed by every federal circuit, wherein it was held that when sitting in a diversity case it is the obligation of the federal courts to follow the law of the state in which it sits. If there is no law on the issue before it, then the federal court is bound to discern what the law of the forum state would be if presented with the issue. Reynolds v. American Life Ins. Co., 591 F.2d 343 (5th Cir. 1979); 28 U.S.C. § 1652; Nobs Chemical, U.S.A. Inc. v. Kippers Co., 616 F2d 212 (5th Cir. 1980) Benante v. Allstate Ins. Co., 477 F2d 553 (5th Cir. 1973).

Due process mandates that a Court apply the admitted facts to a correct principle of law and this is such a fundamental and essential

element of the judicial process that a litigant can not be said to have had the remedy of the due course of the law. State v. Smith, 118 So.2d 792 (1st DCA Fla. 1960); Matthews vs. Metropolitan Life Insurance Co., 89 So.2d 64 (Fla. 1956).[1] Petitioner contends that by disregarding the law of Florida, the Eleventh Circuit has denied him the protection he is to be accorded.

Due to the deprivation of his due process of law imposed upon him by the Eleventh Circuit Court of Appeals, Mr. Huff has been denied a fair hearing and deprived of his property, allowed to him by the law of Florida, simply because the Eleventh Circuit failed to follow the precedent of "Erie Thompkins."

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[1] We cite the Florida cases construing this principle of law since the litigate had the right to expect the Court to applied the Florida law and surely the reach of the due process clause of the Fifth Amendment to the Constitution of the United States should no be any less.

POINT II. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL APPELLATE COURTS ON THE ISSUE OF THE PROCEDURES TO BE USED BY THE FEDERAL APPELLATE COURTS WHEN SITTING IN A DIVERSITY CASE REGARDING THE LAW THAT THE APPELLATE COURT MUST APPLY AND, IF SO, WHETHER THE ELEVENTH CIRCUIT ERRED WHEN IT FAILED TO CERTIFY THAT INSTANT CASE TO THE SUPREME COURT OF FLORIDA FOR A CONSTRUCTION OF FLORIDA LAW OR IN FAILING TO TRY TO CONSTRUE THE LOWER FLORIDA APPELLATE COURT DECISIONS CONCERNING THE PROOF THAT WOULD BE NECESSARY.

In order to alleviate any confusion by the United States Supreme Court or any federal appeals court, the Florida Supreme Court has been provided with jurisdiction to review a question of law certified to it by this Honorable Court or a federal appeals court and then to answer the question certified to it as to what the law of Florida is on a particular subject matter. Article V, Section 3(b)(6), Florida Constitution. This procedure is one not unknown to the Eleventh Circuit Court of Appeals, nor to its sister and parent the Fifth Circuit Court of Appeals. Yet, instead

of seeking this recourse to determine the law of Florida, the Eleventh Circuit Court of Appeals in the instant case, chose to rely upon the law of Colorado, Kentucky, and Montana, as the preferable law to follow and made the law of Florida. The Eleventh Circuit in doing so rendered an opinion that conflicts with Florida law and rendered an opinion which conflicts with the 10th Circuit Court of Appeals which holds that the interpretation of local law given by a district judge should not be disturbed unless it is clearly wrong. Machinery Center Inc. v. Anchor National Life Ins. Co., 434 F2d 1 (10th Circuit 1970).

In the instant case, the same arguments raised by Standard Life in its presentation to the Eleventh Circuit Court of Appeals had been made to the District Court Judge. The District Court Judge heard the arguments and found them to be interesting but declined adopt Standard Life's position due to the fact that his interpretation of Florida law was

that Florida did not require proof of insurability elsewhere. (App. 16-17). The Eleventh Circuit simply adopted its own interpreted by adopting Colorado law. The Court just overlooked the trial judge's interpretation of Florida law and id not make a finding that the District Court's interpretation of Florida law was "clearly wrong". On post trial motions, cited the controlling Florida case and denied the same defense argument which the Eleventh Circuit adopted.

The decision below likewise conflicts with the cases of the Fifth Circuit Court of Appeals, and every other Circuit Court of Appeals, wherein it is held that a federal court sitting in diversity is obligated to follow the state law and if there is no law on that point in the state on a particular issue, then it is imperative that the court discern how the Florida Supreme Court would rule if presented with the issue. Nobs, supra;

Benante, supra; Rayonier, Inc. v. Bryan, 249 F2d 405 (5th Cir. 1957).

POINT III. THE ELEVENTH CIRCUIT COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE INTERVENTION OF THIS HONORABLE COURT WHEN IT DETERMINED THAT THE JURY VERDICT FINDING THE RESPONDENT INSURANCE COMPANY WOULD OWE THE PETITIONER'S DECEDENT INSURANCE COVERAGE BY VIRTUE OF ITS HAVING FAILED TO TIMELY NOTIFY OF A REJECTION BY CONSTRUING THE LAW OF COLORADO AS BEING THE APPLICABLE LAW TO BE FOLLOWED WHEN THE CASE AROSE UNDER AND PURSUANT TO FLORIDA LAW AND SHOULD HAVE BEEN DETERMINED IN ACCORDANCE WITH FLORIDA LAW, WHICH LAW WOULD NOT HAVE REQUIRED THE PROOF OF INSURABILITY WHICH WOULD HAVE ALLOWED MR. HUFF PREJUDGMENT INTEREST.

It is vital to the administration of our system of government that this Honorable Court be accorded the power to intervene when a lower federal appellate court steps aside from the traditions so deep rooted in our system of jurisprudence as to have shocked one's conscience. Hence, on of this Court's powers, as determined by its own Rules, is to review by Certiorari a decision that has departed

from the accepted and usual course of proceeding. Rule 10, Supreme Court Rules.

It is respectfully submitted that the departure from the normal course of proceedings chosen by the Eleventh Circuit Court of Appeals is such an important matter as to require this Court's intervention. The decision below simply shocks the conscience and is so far contrary to the dictates of § 1652 of Title 28 and this Court's "Erie Thompkins" doctrine that without said intervention, other appeals courts and then district courts may decide to create their own federal common law and our traditional concepts of the separation of state's rights and federal rights may falter.

Federal courts are required to follow the meaning and effect no matter what the federal court's opinion is as to the correctness of the State Court's views. Burns Mtg. Co. v. Fried, 292 U.S. 487 (1933) The Eleventh Circuit has, however, done just the opposite.

It has adopted its own view of the law which it finds preferable. In so doing, the Eleventh Circuit has reached a decision contrary to the law of Florida.

There are two controlling cases in Florida. Independent Life Insurance v. McKenzie, 503 So.2d 376 (Fla. 1st DCA 1987) and Huberman v. John Hancock Life Ins. Co., 492 So.2d 416 (Fla. 4th DCA 1986). Both of these cases hold contrary to the cases relied upon by the Eleventh Circuit.

If all of the federal district and appellate courts were to choose the course taken by the Eleventh Circuit in the instant case, our jurisprudence would be in chaos. This Court has the power, however, to prevent that by the granting of a Writ of Certiorari to the Eleventh Circuit.

CONCLUSION

The Petitioner would respectfully submit that many many years have gone by since this

court has addressed an "Erie Thompkins" doctrine issue and that by virtue of what the Eleventh Circuit Court of Appeals has done in the instant case, it would a most appropriate time for this Court to entertain and "Erie Thompkins" doctrine issue and exercise its supervisory powers over the Circuit Court of Appeals. The Petitioner would further submit that by virtue of its own determination to depart from the long established "Erie Thompkins" doctrine, the Eleventh Circuit Court has denied the Petitioner his due process of law and, therefore, it would be proper and most appropriate for this Court to reaffirm the "Erie Thompkins" doctrine by granting him certiorari in this cause.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by a.S. Mail this _____ day of October, 1990 to: JOHN P. KELLY, Esq., FLEMING, O'BRYAN &

FLEMING, P.A., 7th Floor, 500 East Broward Blvd., P.O. Drawer 7028, Ft. Lauderdale, FL 33338, and R. STUART HUFF, 330 Alhambra Circle, Coral Gables, FL 33134.

Respectfully submitted,

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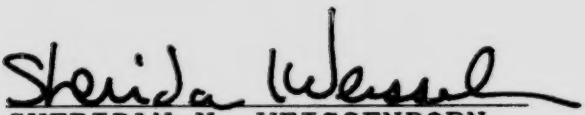

SHERIDAN K. WEISSENBORN

COUNSEL FOR PETITIONER

INDEX TO APPENDIX

Opinion of the 11th Circuit Court of Appeals..... App.1-13

Denial of the U.S. Court of Appeals App. 14-15

Final Judgment of U.S. District Court Southern District..... App. 16

Order of the u.s. District Court Southern District..... App. 17-18

R. Stuart HUFF, as Trustee,
Plaintiff-Appellee,
Cross-Appellant,

v.

STANDARD LIFE INSURANCE
COMPANY, a Mississippi corporation.
Defendant-Appellant, Cross-Appellee.

No. 88-5668

United States Court of Appeals,
Eleventh Circuit.

April 2, 1990

Trustee of insurance proceeds held in trust for mother of deceased insured brought action against insurer to recover proceeds of life policy. The United States District Court for the Southern District of Florida, No. 79-1941-CIV-NCR, Norman C. Roettger, Jr., J., directed verdict in favor of insurer, and plaintiff appealed. The Court of Appeals, 683 F.2d 1363, reversed and remanded. On remand, the District Court entered judgment on a jury verdict finding that insurer was guilty of negligent delay in processing application.

Jury found that insurer was 75% at fault and applicant was 25% at fault, justifying a judgment of $750,000 in favor of plaintiff. Both parties appealed. The Court of Appeals, Cox, Circuit Judge, held that: (1) under Florida law, Plaintiff had to prove that insurer's negligent delay was proximate cause of some injury, and (2) plaintiff failed to meet burden on proximate cause.

Reversed and remanded with instructions.

1. **Insurance - 92.1**

Under Florida law, in order for a plaintiff to recover for negligent delay in the processing of an insurance application, he must prove that insurer's negligent delay was the proximate cause of some injury.

2. **Insurance - 92.1**

Trustee of insurance proceeds failed to prove any damages proximately caused by life insurer's negligent delay in processing of application; trustee failed to show that applicant was insurable under insurer's rules,

limits and standards, and trustee did not prove that applicant could have secured life insurance with another company had insurer notified him within a reasonable time that he was uninsurable.

Appeal from the United States District Court for the Southern District of Florida.

Before VANCE* and COX, Circuit Judges, and CAMP**, District Judge.

COX, Circuit Judge:

We consider this case for the second time. In the first proceeding, the district court granted a directed verdict in favor of Standard Life Insurance Company ("SLIC"). We reversed the district court's decision and remanded for a new trial. Huff v. Standard

*Judge Robert S. Vance was a member of the panel which heard oral argument, but doe to his death on December 16, 1989, did not participate in this decision. This case is decided by a quorum. See 28 U.S.C., Sec. 46(d)

**Honorable Jack T. Camp, U.S. District Judge for the Northern District of Georgia, sitting by designation.

Life Ins. Co., 683 F.2d 1363 (11th Cir. 1982)(Huff I)1 After the second trial, the jury found that SLIC was guilty of negligent delay in processing the life insurance application of Alejandro J. Torres-Ciliberto ("Torres"). The jury found that SLIC was 75 percent at fault and Torres 25 percent at fault. The district Court entered a judgment of $750,000.00 in favor of Huff.2 R. Stuart Huff has assumed various roles during the course of this litigation. He has served as counsel for the trust since the inception of the suit. In addition, he is the plaintiff in this action,suing in his capacity as trustee of the insurance proceeds held in trust for Torres's mother. See Huff I, 683 F.2d at 1363-4, n.1.

Both parties appealed.

FACTUAL BACKGROUND

Torres submitted an application for life insurance to SLIC on May 31, 1978. He died on August 14, 1978. At the time of his death,

SLIC had not informed Torres whether his application had been accepted or rejected. SLIC denied that the policy Torres applied for was in effect. Huff, as trustee for insurance proceeds held in trust for Torres's mother, brought suit against SLIC. For a more detailed explanation of the underlying facts and events occurring prior to the second trial, see Huff I, 683 F.2d at 1364-66. At the second trial, Huff moved to amend his complaint at the close of his case to include a claim that SLIC was guilty of negligent delay in processing Torres's application. Over SLIC's objection, the trial court allowed the amendment. SLIC declined the court's offer of a continuance.

In response to special interrogatories, the jury found that SLIC had failed to either accept or reject Torres's application within a reasonable amount of time after receiving the application. The jury also found that Torres was "uninsurable" under SLIC's rules,

limits and standards3 and did not pay the first premium due under the policy.

On appeal, SLIC attacks the jury verdict for its failure to find damages proximately caused by the delay in processing Torres's application.4 SLIC also raises several other issues. Huff argues that, in addition to the amount of the judgment, he is entitled to attorney's fees and prejudgment interest.

PROXIMATE CAUSE AND DAMAGES

After the jury found that SLIC was 75 percent at fault, the trial court entered a judgment of $750,000.00 in favor of Huff. This figure represents 75 percent of the amount of the policy for which Torres applied (i.e., $1,000,000.00). Because we find that Huff failed to prove any damages proximately caused by SLIC's negligent delay, we reverse.

Although the case law is sparse, Florida courts have recognized a cause of action for negligent delay in the processing of an insurance application. See Independent Life

and Accident Ins. Co. v. McKenzie, 503 Do.2d 376 (Fla. 1st Dist.Ct.App. 1987); Huberman v. John Hancock Life Ins. Co., 492 So.2d 416 (Fla. 4th Dist.Ct.App. 1986). While Florida Courts have not specifically addressed the issue of proximate cause and damages in the context of this cause of action, other courts which have required that the plaintiff satisfy these elements of the claim by proving that the insurance applied for could have been secured or that the insurance could have been secured elsewhere. See, eg., Behnke v. Standard Accident Ins., 41 F.2d 696, 700 (7th Cir. 1930); Life & Casualty Ins. Co. v. Central Steel Products, Inc., 709 S.W.2d 830, 832 (Ky. 1985); Heller-Mark & Co. v. Kassler & Co., 37 Colo.App. 267, 544 P.2d 995, 997 (1976); Weaver v. West Coast Life Ins. Co., 99 Mont. 296, 42 P.2d 729,733 (1935). As explained by the Colorado Court of Appeals in Heller-Mark, 544 P.2d at 997, the very essence of this cause of action is that the insurance

company's negligence caused the absence of insurance coverage, which in turn damages the applicant. If the applicant is uninsurable, he would not have insurance even if the insurance company had not acted negligently; the uninsurable applicant incurs no damage as a result of the negligent behavior.

[1, 2] Applying these sound principles to the case at hand, we hold that in order for Huff to recover, he must prove that SLIC'S negligent delay was the proximate cause of some injury.5 Huff could have met this burden by showing that Torres was insurable under the SLIC's rules, limits and standards. In response to a special interrogatory, however, the jury found that Torres was not "an insurance risk acceptable to [SLIC] under its rules, limits and standards as to the policy applied for." R4-142-1. Similarly, Huff was unable to prove that Torres could have secured life insurance with another company had SLIC notified him within a reasonable time that he

was uninsurable. The evidence adduced at trial showed only that Torres had applied the previous year for similar insurance coverage with another company and "did not take the policy." Equifax Report, Depos. of Beckwith, exhibit 2. The evidence does not, however, show whether Torres's application was accepted. There was no testimony that at the time in question another insurance company would have considered Torres an insurable risk for any kind of life insurance.6 In short, Huff did not establish that SLIC's negligent delay was the proximate cause of some injury. Huff thus did not have an actionable claim for negligent delay.

CONCLUSION

The district court erred in submitting to the jury a claim premised upon the contention that Huff could have obtained insurance from another life insurance company and in entering final judgment for Huff on his negligence claim. In light of this error, we need not

reach the other issues raised by the parties. We REVERSE the decision of the district court and REMAND with instructions to enter a judgment in favor of defendant SLIC.

FOOTNOTES

1. Huff I involved a breach of contract claim based on an insurance policy. Upon retrial, the jury resolved this claim in favor of SLIC. This appeal involves a negligence claim which was added by amendment after Huff I.

2. R. Stuart Huff has assumed various roles during the course of this litigation. He has served as counsel for the trust since the inception of the suit. In addition, he is the plaintiff in this action,suing in his capacity as trustee of the insurance proceeds held in trust for Torres's mother. See Huff I, 683 F.2d at 1363-4, n.1.

3. Torres had applied for a keyman life insurance policy in the amount of $1,000,000.00.

4. SLIC moved for a directed verdict at the close of the case on the ground that Huff had presented insufficient evidence to support a

favorable verdict, R13-730, and on the ground that he had presented no evidence that he "was prejudiced in any way or that he was insurable." R13-732.

5. Huff argues that the amount of the policy should be the basis for measuring damages for negligent delay. As support, Huff cites McKenzie, 503 So.2d at 376, a case in which the amount of the judgment was equal to the amount of the policy. This argument puts the cart before the horse. The present focus is not on the measure of damages, but on whether SLIC's negligence proximately caused any injury at all. In **McKenzie**, the insurance company agents informed the plaintiffs that their applications would be accepted, accepted payment of the first premium and guaranteed the plaintiffs that someone from the company would secure the signatures necessary to make the policies effective. 503 So.2d at 377. In reliance on these representations, the plaintiffs cancelled their existing insurance.

It was thus clearly established in **McKenzie** that the insurance company's negligent delay in processing the plaintiffs' application proximately caused some injury. In the instant case we do not consider the amount by which Huff was damaged until we first consider whether SLIC's actions caused any injury at all.

[6] Moreover, we note that nowhere in his amended complaint does Huff even allege that SLIC's actions caused injury because Torres was an insurable risk. Indeed, the complaint alleges only that SLIC had a duty toward Torres, which SLIC breached. Although Huff argued generally in his closing statement that Torres could have obtained the insurance elsewhere, this argument is entirely insufficient to satisfy the causation and damage elements of this cause of action for negligent delay.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-5668

R. STUART HUFF, as Trustee
Plaintiff-Appellee
Cross Appellant.

versus

STANDARD LIFE INSURANCE COMPANY,
a Mississippi Corporation,
Defendant-Appellant,
Cross-Appellee

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

(Opinion April 2, 1990, 11 Cir., 198__, ____F.2d____)
(June 4, 1990)
Before VANCE* and COX, Circuit Judges and CAMP**, District Judge

PER CURIAM:

(X) The Petition(s) for rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in

favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-3), the Suggestion (s) of Rehearing In Banc is DENIED.

( ) A member of this court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Bank is DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

*Judge Robert S. Vance was a member of the panel which heard oral argument but due to his death on December 16, 1989, did not participate in this decision. This case is decided by a quorum. See 28 U.S.C. section 46(d)

**Honorable Jack T. Camp, U.S. District Judge for the Northern District of Georgia, sitting by designation.

R. STUART HUFF, As Trustee,

Plaintiff,

v. FINAL JUDGMENT

STANDARD LIFE INSURANCE COMPANY,

Defendant.

_____/

THIS CAUSE is before the Court following the completion of a jury trial. In accordance with the special verdict returned by the jury, it is hereby

ORDERED AND ADJUDGED that Judgment is entered in favor of Plaintiff and against Defendant in the amount of $750,000.00, plus interest at the rate of 6.04% per annum and costs.

FURTHER ORDERED AND ADJUDGED that Defendant take nothing from this action.

DONE AND ORDERED this 6th day of April 1987.

_____

NORMAN C. ROETTGER, JR.
UNITED STATES DISTRICT JUDGE

cc: counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 79-1941-CIV-ROETTGER

R. STUART HUFF,

Plaintiff,

v. ORDER

STANDARD LIFE INSURANCE COMPANY,

DEFENDANT.
_____/

THIS CAUSE is before the Court on various motions of PLAINTIFF, R. STUART HUFF, and DEFENDANT, STANDARD LIFE INSURANCE COMPANY.

Although the jury's answers to interrogatories might present a reason at first blush to grant DEFENDANT's Motion for Judgment Notwithstanding the Verdict, the jury's answers clearly are not inconsistent with the requirements of the tort of negligent delay, see, Independent Life and Accident Insurance Company v. McKenzie, 503 So.2d 376 (Fla. 1st DCA 1987); Palmer v. Liberty National Life Insurance Company, 499 So.2d 903 (Fla. 1st DCA 1986); Huberman v. John Hancock

Mutual Life Insurance Company, 492 So.2d 416 (Fla. 4th DCA 1986).

WHEREFORE, and upon consideration of the record in this cause, it is

ORDERED AND ADJUDGED that

1) DEFENDANT's Motion for Judgment Notwithstanding the Verdict is DENIED.

2) DEFENDANT'S Motion to Dismiss Amended Complaint is DENIED.

3) PLAINTIFF'S Motion for Entry of Judgment, which the Court shall treat as a Motion for Judgment Notwithstanding the Verdict, is DENIED.

4) PLAINTIFF's Motion to Alter or Amend Judgment to provide for an award of attorney's fees and prejudgment interest is DENIED.

DONE AND ORDERED this 14 day of June, 1988.

Norman C. Roettger, Jr.
UNITED STATES DISTRICT JUDGE

cc: counsel of record

Supreme Court, U.S.
FILED
NOV 28 1990
JOSEPH F. SPANIOL, JR
CLERK

(2)

No. 90-695

In The

Supreme Court of the United States

October Term, 1990

R. STUART HUFF, as Trustee,

Petitioner,

vs.

STANDARD LIFE INSURANCE COMPANY,
a Mississippi Corporation,

Respondent.

Petition For A Writ Of Certiorari
To The Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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November 27, 1990

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QUESTION PRESENTED

Whether the Court of Appeals for the Eleventh Circuit properly decided a novel issue of Florida tort law by consulting Florida intermediate appellate court decisions, reviewing the law of sister state courts on the identical issue, and applying general principles of Florida tort law?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REASON THE PETITION SHOULD BE DENIED ... 1

CONCLUSION 4

TABLE OF AUTHORITIES

Page

American Triticale, Inc. v. Nytco Services, Inc., 664 F.2d 1136 (9th Cir. 1981) 2

Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956) 2

Calcasieu-Marine Nat. Bank v. American Employers' Ins. Co., 533 F.2d 290 (5th Cir. 1976), *cert. denied*, 429 U.S. 922 (1976) 2

Cross v. State Farm Mut. Auto. Ins. Co., 873 F.2d 75 (4th Cir. 1989) 3

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 1

Florida East Coast R. Co. v. Wade, 53 Fla. 620, 43 So. 775 (1907) 3

Francis v. INA Life Ins. Co., 809 F.2d 183 (2d Cir. 1987) 3

Huff v. Standard Life Ins. Co., 897 F.2d 1072 (11th Cir. 1990) 3

Maseda v. Honda Motor Co., 861 F.2d 1248 (11th Cir. 1988) 2

Metz v. United Technologies Corp., 754 F.2d 63 (2d Cir. 1985) 2

Orfield v. International Harvester Co., 535 F.2d 959 (6th Cir. 1976) 2

Tidler v. Eli Lilly & Co., 851 F.2d 418 (D.C. Cir. 1988) 3

Towne Realty, Inc. v. Safeco Ins. Co., 854 F.2d 1264 (11th Cir. 1988) 2

Weiss v. United States, 787 F.2d 518 (10th Cir. 1986) 2

REASON THE PETITION SHOULD BE DENIED

The questions presented by the petitioner do not raise issues worthy of this Court's review. They do not state reasons for this Court's exercise of judicial discretion to grant the petition even remotely within the confines of Rule 17 of the Rules of the Supreme Court of the United States.

The pivotal point raised by the petitioner is that the Court of Appeals for the Eleventh Circuit applied state law other than that of the State of Florida in ruling that the petitioner did not have an actionable claim for negligent delay against the respondent insurance company arising out of an application for life insurance. The petitioner then posits that the lower court violated the *Erie* doctrine, which respondent surmises the petitioner considers a denial of due process. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1937). The petitioner's nebulous reasoning, and perhaps his understanding of applicable law, is simply incorrect.

The Eleventh Circuit panel correctly found that the Florida Supreme Court never has ruled on the specific issue of whether a plaintiff was required to prove that a life insurance company's negligent delay in acting upon a life insurance application was the proximate cause of damages to the plaintiff. The circuit court also correctly found that no Florida intermediate appellate court had ruled on the issue. However, the Eleventh Circuit panel did rule on the issue as the Florida Supreme Court would decide the issue, and in that process the panel considered the law of sister states, just as would the Florida high

court. In the absence of controlling Florida law, the federal appellate court assumed the vicarious role of the Florida Supreme Court in order to apply well-settled tort law to the claim presented.

A federal court ordinarily must apply the state law as pronounced by the state's highest court. *See Towne Realty, Inc. v. Safeco Ins. Co.*, 854 F.2d 1264 (11th Cir. 1988). In filling a void under state law, a federal court must predict how the state's highest court would rule. A novel question of state law may be resolved by examining policies, principles, and state court decisions in analagous areas of the state's law. *Weiss v. United States*, 787 F.2d 518 (10th Cir. 1986). In assuming this soothsayer role, the federal court may consider the state's intermediate appellate court decisions. *See American Triticale, Inc. v. Nytco Services, Inc.*, 664 F.2d 1136 (9th Cir. 1981). But intermediate state court decisions are not binding on the federal court if that court believes that the highest state court would decide the issue differently. *Maseda v. Honda Motor Co.*, 861 F.2d 1248 (11th Cir. 1988).

In the absence of a guiding light from the state's intermediate court system, the federal court may utilize all the resources which would be available to the state's highest court. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956) (Frankfurter, J., concurring); *Orfield v. International Harvester Co.*, 535 F.2d 959 (6th Cir. 1976). Case law of other jurisdictions is one of the appropriate resource tools, particularly when the issue of a particular state's law partakes of national law. *Calcasieu-Marine Nat. Bank v. American Employers' Ins. Co.*, 533 F.2d 290 (5th Cir. 1976), *cert. denied*, 429 U.S. 922 (1976); *Metz v. United Technologies Corp.*, 754 F.2d 63 (2d Cir. 1985). Certification

to a state supreme court is also a method for a federal court to resolve an issue of state law. *E.g., Cross v. State Farm Mut. Auto. Ins. Co.*, 873 F.2d 75 (4th Cir. 1989). However, the certification decision rests in the sound discretion of the federal appellate court, and it will not be invoked where the court can resolve the issue with little uncertainty, particularly when the relevant resources provide a discernible path for the court to follow. *Tidler v. Eli Lilly & Co.*, 851 F.2d 418 (D.C. Cir. 1988). If by considering all resources that a state court could use, the issue can be resolved, the federal appellate court should decide the issue. *See Francis v. INA Life Ins. Co.*, 809 F.2d 183 (2d Cir. 1987).

In fulfilling its role as a Florida court surrogate, the Court of Appeals for the Eleventh Circuit, though consulting the law of other jurisdictions on an issue of uniform national law, i.e., life insurance, actually applied a principle of tort law long ago resolved by the Florida Supreme Court. Proximate causation is an essential element of negligence under Florida law, a point that can hardly be disputed. *See, e.g., Florida East Coast R. Co. v. Wade*, 53 Fla. 620, 43 So. 775 (1907).

There was nothing unique about this issue that required certification to the Florida Supreme Court. As the Eleventh Circuit panel properly reasoned, the determinative issue was whether it was necessary that the plaintiff incur "any damages at all" as an element of a negligence claim. *Huff v. Standard Life Ins. Co.*, 897 F.2d 1072, 1074, n.5 (11th Cir. 1990). This proposition hardly required a complicated, or even rudimentary, analysis of Florida law – or any state's law for that matter. The lower court merely applied a conventional tort principle to the

facts of the case. Therefore, the actual decision below was not based on a new pronouncement of state law, but rather, was old wine in a new bottle; the Court of Appeals for the Eleventh Circuit properly found that the facts in the record failed to establish the element of proximate causation in a negligence case.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that R. Stuart Huff's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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